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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 71-265

WILLIAM WALTER d/b/a CLASSIC ART THEATRES I AND II AND PATRICIA REILEY WALTER d/b/a ASHLEY ART ADULT THEATRE,

Petitioners,

v.

LEWIS R. SLATON, DISTRICT ATTORNEY, ATLANTA JUDICIAL CIRCUIT; HINSON McAULIFFE, SOLICITOR GENERAL OF THE CRIMINAL COURT OF FULTON COUNTY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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IN THE

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NO. ————

WILLIAM WALTER d/b/a CLASSIC ART THEATRES I AND II AND PATRICIA REILEY WALTER d/b/a ASHLEY ART ADULT THEATRE,

Petitioners,

v.

LEWIS R. SLATON, DISTRICT ATTORNEY, ATLANTA JUDICIAL CIRCUIT; HINSON McAULIFFE, SOLICITOR GENERAL OF THE CRIMINAL COURT OF FULTON COUNTY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioners pray that a writ of certiorari issue to review the decision of the Supreme Court of Georgia on May 13, 1971, and the Motion For Rehearing denied on June 2, 1971.

OPINION BELOW

The decision of the Supreme Court of Georgia is reported at 227 Ga. 676, ____ S.E. 2d ____. The Order

overruling the Motion For Rehearing is without an opinion, and is noted at 227 Ga. 676, ____ S.E. 2d ____. Both judgments are printed in Appendix A.

JURISDICTION

The decision of the Supreme Court was entered on May 13, 1971. Timely application for rehearing was filed and denied on June 2, 1971.

The jurisdiction of the Court is invoked under 28 U.S.C. 1257(3) since rights, privileges and immunities guaranteed to petitioners by the United States Constitution were infringed by the judgment of the Georgia Supreme Court.

QUESTIONS PRESENTED

I. Are the Georgia Nuisance Statutes constitutionally inadequate as a means of controlling obscenity since there are no procedural safeguards to protect legitimate expression?

II. Are the Georgia Nuisance Procedures and Statutes constitutionally defective since no burden is placed on the censor-prosecutor to come forward with evidence and the censor-prosecutor presented no evidence at the trial?

III. Were the petitioners denied due process of law by being denied a continuance and thereby were denied the right to have counsel present evidence in their behalf?

CONSTITUTIONAL PROVISIONS

Constitution of the United States:

First Amendment

Congress shall make no law respecting on establish-

ment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

The Georgia Nuisance Statutes are set forth in Appendix B.

STATEMENT OF THE CASE

Petitioners, pursuant to Rule 46, are filing a joint petition for certiorari.

The respondents filed four petitions on four different occasions in the Superior Court of Fulton County entitled "Complaint To Declare Motion Picture Obscene and Subject to Seizure." The proceedings were substantially identical. The errors raised are identical in the four (4) hearings, and the facts and law are substantially identical.

The first petition was filed on October 21, 1970 alleging that a film called "Zap" was obscene. An order was attached ordering the appellants to show cause on October 23, 1970 at 9:30 A.M. why the film should not

be seized, declared obscene, be enjoined from showing same, and that the appellants were further ordered to produce the film for showing and were enjoined from concealing, destroying, altering or removing the film outside the jurisdiction of the court.

At the beginning of the hearing appellant's lawyer stated that the complaint was served on Wednesday, October 21, and the appellants obtained counsel the next day, being October 22, and therefore he had been retained for less than one day or for only a period of hours. Counsel noted the complaint was unverified and requested the court for a continuance since he had no time to prepare. He further made objections that there is no type of statutory provision for this type of proceeding and asked the court on what the ground rules were. The court responded that this is an adversary hearing as required by the federal courts. The court denied the motion to continue after counsel said he had not seen the film and did not have time to prepare. The court then viewed the film, and again a motion for continuance was renewed and denied. In general, doing the best he could under the circumstances, he argued that nudes are not obscene per se, that in *Stanley v. Georgia*, 394 U.S. 557, the right of privacy is extended to showing a film to consenting adults, and that community standards may not hold the film obscene. The court then stated "*** Mr. Greenblatt *** I know of no evidence that you could introduce ***" that would change the court's opinion that the film is obscene. William Walter was called by the respondents for purposes of cross-examination. Walter admitted he was the owner of Classic Art Theatre I.

Later the same day the court then viewed the film

"Innocent Nymph Part II" following the same procedure as above, and denied a continuance after counsel again stated that he had no time to prepare and had not seen the film. Defense counsel then argued that in a civil proceedings a defendant has thirty (30) days to prepare or twenty (20) days in a declaratory judgment case. Further that the adversary hearing denied him an opportunity to be heard because of the short notice and in general gave the same argument as in the first hearing.

The court ruled both films obscene from the bench and issued two (2) written orders on October 26 declaring both films obscene and ordered the films seized, under the search warrant law, by the Sheriff and delivered to the respondents on said date. On October 27 respondent, Hinson McAuliffe, took out criminal accusations against Walter, but before the films had been seized by the Sheriff.

On October 27, 1970 a rule for contempt was filed requiring William Walter to show cause on October 29 at 9:30 A.M. why he should not be held in contempt for failing to give the films to the Sheriff. Different Counsel appeared at the contempt hearing, and stated to the court that he had not even read the court's order and that the file and all the papers were just handed to him late last night and asked for a continuance. The court ordered the respondents to read the contempt citation to counsel. Respondents also argued that in other federal cases a print of the film be made available for criminal prosecutions. The court overruled the motion for continuance. After some testimony by an investigator and a deputy sheriff which showed William Walter had not refused to turn the film over, the court ordered him to take the stand. Counsel objected on the grounds that he would incriminate himself since there

were presently outstanding two (2) criminal warrants based on the two films, naming William Walter as defendant. The court then ordered Walter to turn in the two (2) films or go to jail for contempt. The court stated "I think the State is entitled to have it (films) as evidence." The films were then turned over to the Sheriff under threat of confinement in jail.

A similar proceeding was filed on November 3, 1970 and a hearing was had on November 6, 1970. There was no transcript of the proceedings as there was no testimony. A stipulation was filed in which petitioners made a motion for a continuance and a motion to dismiss. Both were denied. The court, after viewing the film, ruled it obscene and ordered it seized by issuing a search warrant order and enjoining showing of same. The initial order also ordered petitioners to bring the film to court. Under threat of contempt and a court order, the film was turned over to respondents, and a criminal accusation taken out immediately thereafter based on said film. It should be noted that counsel for the petitioners was given two (2) days notice which was the longest period of time given in the four (4) hearings. A criminal accusation was taken out against Patricia Walter immediately thereafter.

No useful purpose would be served in reviewing the facts of the last hearing. Counsel was given a one (1) day notice to appear in court to answer the petition. Similar motions were made for a dismissal and a continuance and were denied. The court issued the identical orders as it did in the above three (3) hearings. Another criminal accusation was then taken out against William Walter.

In all four (4) hearings the only evidence presented

by respondents was to show where the films had played beside the actual showing of the films.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THIS COURT AND IS THEREFORE INCORRECT.

A. *The Writ should be granted since the Georgia Nuisance Statutes have no procedural safeguards to protect legitimate expression, and are constitutionally inadequate as a means of controlling obscenity.*

Georgia Code Section 72-101, 72-102, 72-201 and 72-202 sets out a statutory scheme for the prohibition and abatement of nuisances. Nothing is mentioned about exhibiting obscene films. Chapter 72-3 is entitled "Houses of Prostitution," and the statutes under this section again make no mention of the exhibiting of obscene films. Chapter 72-4 is entitled "Nuisances in Cities" and 72-401 gives the police court jurisdiction to abate a nuisance.

The decision of the Georgia Supreme Court made no reference to which statute the State was proceeding under, but did cite as authority *Lee v. Hayes*, 215 Ga. 330, 331, 110 S.E. 2d 624 (1959). In that case Georgia Code sections 72-201 and 72-301 are cited as giving the solicitor general a cause of action for abatement of a public nuisance, being the operating of a lewd house. In the *Lee* case the petition alleged gambling was going on, and illegal beer and whisky was being sold.

In Ga. Code 72-301 which is under Chapter 72-3 entitled "Houses of Prostitution," the only word in this statute that could be applied to obscenity is the word

"lewdness." The word "lewd" has already been held unconstitutionally vague in *Hunter v. Allen*, 286 F. Supp. 830, 837 (N.D. Ga. 1968). Also the Ninth Circuit Court of Appeals has concluded that "rotten books [and films] * * * obsessed with sex," without literary merit, which "at best * * * are junk" are according to current constitutional doctrine, protected by the First Amendment. *Grant v. United States*, 380 F. 2d 748, 749 (CA 9, 1967). See also *Redrup v. New York*, 386 U.S. 767 (1967). Obviously the word "lewd" could be applied to the type of material in *Grant* and *Redrup*.

In Ga. Code 72-201 any nuisance, which tends to the immediate "annoyance of the citizens" and is "injurious to the public health" or tends greatly to "corrupt the manners and morals" of the people may be abated. Recently in *Cohen v. California*, ____ U.S. ____, 29 L.ed. 2d 284 (June 7, 1971) this Court held that the words "Fuck the Draft" plainly visible on a jacket gave the State no right under the First and Fourteenth Amendments to punish the defendant. Accordingly any material that annoys or tends to corrupt cannot be constitutionally suppressed, and therefore Ga. Code 72-201 is totally overbroad and vague and fails by its own words as a means of controlling obscenity.

The Georgia statutes have insufficient procedural safeguards for dealing with obscenity. Ga. Code section 72-303 gives the defendant three days' notice, and if he asks for a continuance the temporary injunction shall be granted as a matter of course. In the instant case, in all four (4) hearings, respondents were not even given the statutory three (3) days' notice. Apparently the final trial shall be at the first term of the court (Ga. Code section 72-305). In the Fulton County Superior Court

the average time to get to a jury in a civil case is approximately thirteen (13) months. (Findings of May-June 1971 Fulton County Grand Jury). The Georgia rule that equity cases shall be tried at the first term is a relic of the past. Also terms of Court vary from two (2) months in Fulton County to as much as six (6) months in certain rural counties.

Georgia Code section 72-302 permits an ex parte injunction. Georgia Code sections 72-304, 72-308, 72-309 and 72-311 provide stiff penalties if the temporary injunction is violated. A clear reading of these statutes show that once the temporary injunction is granted the suppression of the film is, in essence, complete.

In the instant case the Court, from the bench, issued temporary injunctions on October 23, October 30 and November 6, 1970, and a decision by the Georgia Supreme Court was not rendered until May 13, 1971. Counsel for petitions acted as quickly as possible in prosecuting the appeal, but it still took over six (6) months for an appellate decision.

It is apparent that such a scheme, when applied to the delicate problem of separating constitutionally-protected materials from those which may be regulated by government, falls short of the required constitutional standard under the First and Fourteenth Amendments.

First, no standard of what constitutes a statutory nuisance appears in the statute. The overbreadth of the statutory description of what is prohibited is inimical to obscenity standards enunciated in recent Supreme Court decisions. See *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *Redrup v. New York*, 386 U.S. 767 (1967); *Stanley v. Georgia*, 394 U.S. 557 (1969).

Second, despite the penalties of a harsh and quasi-criminal nature, the statutory scheme makes no provision for a requirement of scienter, criminal intent or guilty knowledge, an essential ingredient of legitimate governmental regulation of obscenity. *Smith v. California*, 361 U.S. 147 (1961).

Third, the statute shifts the burden of proof of the non-obscenity of the material charged to be a nuisance to the accused, although the burden of proving that material is obscene, and therefore, unprotected expression, must rest upon those who would suppress it. See *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

Fourth, the statute allows ex parte injunctions against nuisances, including films claiming First Amendment protections, without a prior adversary determination of the obscenity of the material restrained or in the alternate the temporary injunction is granted if the defendant asks for a continuance. Such a statutory scheme is clearly prohibited under decided Supreme Court case law. *Marcus v. Search Warrants*, 367 U.S. 717 (1961); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Freedman v. Maryland*, 380 U.S. 51 (1965).

Fifth, although the statutory scheme permits precensorship of materials which claim First Amendment protection, it provides no procedural assurance of an immediate hearing, after either temporary or permanent restraint, no assurance of an immediate judicial decision thereafter, and no assurance of a speedy and accelerated judicial review. Such a censorship system is constitutionally impermissible. *Marcus v. Search Warrants*, 367 U.S. 717 (1961); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Freedman v. Maryland*, 380 U.S. 51

(1965); *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 141-142 (1968).

Sixth, the statute makes no distinction between private possession and public dissemination of obscene materials charged as nuisances, and applies sanctions against both. Governmental regulation of private possession and use of obscenity is constitutionally impermissible. See *Stanley v. Georgia*, 394 U.S. 557 (1969).

Seventh, the penalties are so broad and sweeping (including the closing of a theater for a year even as to exhibition of non-obscene films; see Georgia Code section 72-309) and so unnecessarily oppressive and punishing as to inhibit the resolution of such constitutional questions as the obscenity of particular materials in courts under procedures designed to safeguard the dissemination of borderline materials. *Smith v. California*, 361 U.S. 147 (1961); *Bantam Books v. Sullivan*, 372 U.S. 58 (1963); *Speiser v. Randall*, 357 U.S. 513 (1958).

Thus, it is apparent that the Georgia Nuisance Statute as an instrument of governmental regulation of obscenity, falls short of the constitutional mark. It is now beyond argument that "[s]tate regulation of obscenity must 'conform to procedures that will insure against the curtailment of constitutionally protected expression, which is often separated from obscenity by a dim and uncertain line' *Bantam Books v. Sullivan*, [372 U.S. 58, 66 (1963)]." *Quantity of Books v. Kansas*, 378 U.S. 205, 210 (1964).

Two courts have come to grips with whether a state can control obscenity on the theory of a public nuisance in an equity proceeding. In *Grove Press v. Philadelphia*,

418 F. 2d 82 (CA 3, 1969), and *Commonwealth v. Guild Theatre, Inc.*, 432 Pa. 378, 248, A. 2d 45 (1968), it was held that, on strikingly similar set of facts as the instant case, the State of Pennsylvania procedural scheme lacked the safeguards citing *Freedman v. Maryland*, supra.

Petitioners are aware of no case in which this Court has yet considered the constitutional implications of a nuisance statute of the type here involved. In an area in which sensitive control procedures are constitutionally compelled, this Court's consideration of this issue is imperative.

II. THE DECISION BELOW IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. *The Writ should be granted since no burden is placed on the censor-prosecutor to come forward with evidence under the Georgia Nuisance Statutes, and the censor-prosecutor presented no evidence at the trial.*

The trial court ordered the petitioners to bring the film to court for showing based on the complaint filed by the respondents. The respondents presented no evidence during the trial except the showing of the film, and the fact that the films had been shown at the named theatre.

In *Freedman v. Maryland*, supra, at page 58 the Supreme Court said:

> "First, the burden of proving that the film is unprotected expression must rest on the censor."

In *Speiser v. Randall*, 357 U.S. 513, 526, it was held that:

"Where the transcendent value of speech is involved, due process certainly requires . . . that the state bear the burden of persuasion to show that appellants engaged in criminal speech."

Petitioners also rely on *United States v. Klaw*, 350 F. 2d 155 (2nd Cir., 1965) and *Hudson v. United States*, 234 A. 2d 903 (Ct. App. D.C. 1967) where the failure of the government to prove contemporary standards requiring the granting of a motion for directed verdict.

Applying the foregoing law to the instant case, the trial court was compelled to find the four (4) films not obscene since the State of Georgia did not carry the burden.

III. THE DECISION BELOW IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. *The Writ should be granted since petitioners were denied due process of law by being denied a continuance and thereby were denied the right to have counsel present evidence in their behalf.*

In *Hovey v. Elliott*, 167 U.S. 409 (1897), the Supreme Court of the District of Columbia deprived a defendant of his right to answer a suit brought against him. Having stricken the defendant's answer, the court entered judgment against him as a punishment for his refusal to deliver to the court appointed receiver certain funds which were the subject matter of the litigation. When the State of New York later refused to honor that judgment, the Supreme Court of the United States held: "that the District Court of Columbia had deprived defendant of his property without Due Process of law by denying him his constitutional right to a day in court."

The Supreme Court, at 167 U.S. 409, 220, went on to say that a hearing, an opportunity to be heard, is fundamentally in effect, part and parcel of due process:

> "The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to enter decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such authority into an instrument of wrong and oppression . . .
>
> " 'A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.' "

In *Hovey* the Supreme Court reaffirmed the common law that "no man was condemned without being afforded opportunity to be heard" in constitutional terms. And, explained the Court, this principle is simply the rule of natural reason, expressed by Seneca 2000 years ago: Qui statuit aliquid, parte inaudita altera, Aequum licet statuerit, haud aequus fuit. He who determines any matter without hearing both sides, though he may have decided right, has not done justice.

The "procedure" granted to the petitioners in this case did not, for example, allow them time to fully prepare their case; it prevented them from having their cause presented by counsel; precluded them from being heard.

Nonetheless, the trial court required that the hearing proceed and then determined all issues without hearing from the petitioners. Our question is the same as that asked by John, 7:51, some 2000 years ago: "Doth our law judge any man, before it hear him and know what

he doeth?" The fact that the trial judge advised the petitioners *after* he had decided the case that he would let them present any evidence is certainly not an acceptable answer. This is especially true where the trial judge stated that nothing the petitioners could say would change his mind. Thus, in effect, the trial court, by volition denied "due process" by fully determining the case after a "hearing" in which only one side was allowed to be heard.

CONCLUSION

This Petition For A Writ of Certiorari has attempted to present a brief description of the substantial issues presented and why this Court should give plenary consideration to them. The protection of freedom of expression is paramount in a free society.

For the above reasons the Petition For Writ of Certiorari should be granted, the judgment below reversed, the Georgia statutory scheme be declared constitutionally inadequate as a means of controlling obscenity and the films be returned to petitioners.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I duly mailed copies of the foregoing Petition For A Writ of Certiorari to Honorable Arthur Bolton, Attorney General of Georgia, State Judicial Building, Atlanta, Georgia, Hon. Lewis R. Slaton, District Attorney, Atlanta Judicial Circuit, Fulton County Courthouse, Atlanta, Georgia and Hon. Hinson McAuliffe, Solicitor General of the Criminal Court of Fulton County, Civil and Criminal Court Building, Atlanta, Georgia on the _____ day of August, 1971.

GLENN ZELL

APPENDIX A

OPINION OF THE GEORGIA SUPREME COURT

26312, 26313, 26316, 26326. WALTER et al. v. SLATON et al. (four cases).
26332. SANTAY v. SLATON et al.

1. The procedure followed in each of these cases was approved by this court in *Evans Theatre Corp. v. Slaton*, 227 Ga. 377 (180 SE2d 712), as against substantially the same objections as were made in these cases. The ex-parte orders issued did not operate as prior restraints on the showing of the films but were merely the proper exercise by the court of its power to preserve its jurisdiction over the subject matter of the litigation until hearings could be had.

2. The ex parte restraining orders having been supplanted by temporary injunctions, questions respecting their validity are moot.

3. The evidence in each case authorized the issuance of a temporary injunction.

ARGUED FEBRUARY 9, 1971—DECIDED MAY 13, 1971—REHEARING DENIED JUNE 2, 1971.

Injunction. Fulton Superior Court. Case No. 26313 before Judge Tanksley; others before Judge Shaw.

Glenn Zell, Stanley H. Nylen, Arthur Schwartz, for appellants.

Lewis R. Slaton, District Attorney, Hinson McAuliffe, Solicitor, Tony H. Hight, Tom Moran, Frank A. Bowers, for appellee.

HAWES, Justice. The ultimate question in each of these cases is the validity of an order passed in each case by a

Judge of the Superior Court of Fulton County finding that a described 16 millimeter film, which had theretofore been exhibited and was being exhibited at the time by the defendants to the public, was hard core pornography and restraining further showing of such film by the defendants. Each case was commenced as a civil action by the District Attorney of the Superior Court of Fulton County jointly with the Solicitor of the Criminal Court of Fulton County. In each case the plaintiffs alleged that the defendants named therein were conducting a business of exhibiting motion picture films to members of the public; that they were in control and possession of the described motion picture film which they were exhibiting to the public on a fee basis; that said film "constitutes a flagrant violation of Ga. Code § 26-2101 in that the sole and dominant theme of the motion picture film . . . considered as a whole, and applying contemporary standards, appeals to the prurient interest in sex and nudity, and that said motion picture film is utterly and absolutely without any redeeming social value whatsoever and transgresses beyond the customary limits of candor in describing and discussing sexual matters." Then follows a brief description of the contents of the film in each case, and finally the complaint in each case alleges that under the law applied to such matters an adversary hearing to determine the question of obscenity must first be had prior to seizure of the film and the destruction thereof. The prayers were for service on the defendants, the issuance of a rule nisi requiring the defendants to show cause on a day certain why the films described in each case should not be declared obscene and subject to seizure; that the defendants be directed to have and to produce on the hearing of said matter the motion picture film involved;

that the film be declared obscene and subject to seizure; that the defendants and each of them be temporarily and permanently enjoined from exhibiting the picture and that each of them be temporarily restrained and enjoined from destroying, altering, concealing or removing it from the jurisdiction of the court, and that the plaintiffs have such other and further relief as may to the court seem meet and proper. None of the complaints were verified, but were merely signed by an assistant solicitor of the Criminal Court of Fulton County and an assistant district attorney of the Atlanta Judicial Circuit as attorneys for the plaintiffs.

Upon each complaint, a Judge of the Superior Court of Fulton County signed an ex parte order requiring the defendants to show cause before him at a time therein fixed ranging from one to three days thereafter why the prayers of plaintiff's complaint should not be granted and the motion picture referred to therein be declared obscene. He further ordered that the defendants have and produce before the court on the appointed date one print of the motion picture film referred to in the complaint, together with proper equipment for exhibiting and viewing the same, or, in the alternative, to provide a suitable location for that purpose wherein the film could be viewed by the court, and in each case he temporarily restrained and enjoined the defendants from concealing, destroying, altering or from removing the motion picture involved from the jurisdiction of the court. On the day on which the order was signed by the trial judge, a copy of the complaint, together with a copy of the order and a summons, was served on the defendants named in each complaint. In each case the hearing to determine whether the film in question was obscene was held on the day set by the order. In each

case the trial court, after viewing the film in question, either at the theatre operated by the defendants or in the courtroom and after hearing argument of counsel found that there is probable cause to believe that the film in question is obscene and hard core pornography as a matter of fact and as a matter of law, and he ordered the seizure of one copy of the film from the possession of the defendants and the retention of the same in the custody of the Solicitor of the Criminal Court of Fulton County until further order of the court. He further restrained and enjoined the defendants from distributing and exhibiting or showing the film in any theatre or any other place where the public is permitted within the jurisdiction of the court.

1. In each of the cases, Nos. 26312, 26313, 26316 and 26326, appellants contend that the court "erred in proceeding with the complaint in the absence of statutory standards, provision for jury trial and other constitutional safeguards, as the procedure violated appellants' Fourteenth Amendment right of due process under the United States Constitution." In case No. 26332 appellant contends that the procedure in the trial court denied him those rights guaranteed under the First and Fourteenth Amendments of the Constitution of the United States in that the hearing was not adversary in nature and in that the ex parte restraining order operated as a prior restraint. These are substantially the same contentions as were made by the appellants in *Evans Theatre Corp. v. Slaton*, 227 Ga. 377, supra. In Division 4 of the opinion in that case this court held such contentions to be without merit. However, we did recognize that the hearing there was interlocutory in nature and we directed that the judgment of the trial court be modified so as to show that it was not a permanent injunction

but was only to continue in force until the final hearing of the case by a jury. We give the same direction in this case. While it is true that the judgments appealed from order the seizure of the films in question and the delivery of the possession of the same to the Solicitor of the Criminal Court of Fulton County "until further order of this court" and while the trial judge described the injunction and restraint as a "preliminary" one, nevertheless, the injunction feature of the order is without limit as to time and it therefore should be amended so as to provide that it shall continue only "until further order of the court."

It must be kept in mind that the procedure followed here was nothing more or less than a hearing to determine whether a temporary injunction would be issued restraining the showing of the film. Such a hearing does not finally determine rights. The defendants were served with notice of the hearing; it appears that they were present both in person and represented by counsel; and they were afforded an opportunity to argue the issues. The hearings were thus adversary proceedings as we understand the term. See 2A Words and Phrases, p. 155. Being, however, mere temporary injunction hearings, they need not be surrounded with the formalities of procedure that must attend hearings finally determining rights. As was held in the *Evans Theatre* case, the question of whether the trial judge will grant a continuance on such a hearing is within his sound legal discretion, and in the absence of a clear showing that he abused his discretion in this regard it will not be controlled. In view of the transitory and intangible nature of the object of the restraint in these cases, and in view of the fact that if restraints had not been immediately imposed the questions would likely have become moot and there

would have been no way to have the issues adjudicated, we think that under the ruling in the *Evans Theatre* case the trial court did not abuse its discretion in denying a continuance in each of the cases here before us. No contention is specifically raised by any of the grounds of enumerated error that the denial of a continuance constituted a denial of constitutional guarantees of due process or that it in any other way impinged upon the constitutional rights of the defendants, and we, therefore, do not pass upon this question.

The ex parte orders did not operate as prior restraints. They did not restrain or enjoin the defendants from continuing to show the films in question but merely restrained the defendants from removing the films from the jurisdiction of the court. The provision of such orders requiring the defendants to have and produce the films in court, or, in the alternative, to provide a place for the court to view the films, properly construed, was merely an exercise by the court of its subpoena power and was a necessary provision in order for the court to perform its functions. Such order was not injunctive in nature and cannot be construed as a mandatory injunction.

2. The contentions with respect to the issuance of the ex parte restraining orders in the absence of sworn complaints or in the absence of complaints supported by affidavits showing that irreparable harm was likely to result if such ex parte restraining orders were not issued need not now be considered, since the ex parte restraining orders have been supplanted by temporary injunctions issued after a hearing. Nothing done in connection with such ex parte restraining orders in any way bears on the validity of the orders appealed from. The questions thus sought to be raised are moot.

3. The orders appealed from in each case describe the conduct depicted in the film there involved. No useful purpose would be served by quoting such descriptions. Suffice it to say that in each case the films are shown by the language of the orders appealed from to depict continually throughout their length actual sexual activity, both natural and unnatural, of the most salacious character. Some of the films have sound tracks, while others do not; some have titles appended and some have no title but merely begin within the first foot of the film depicting various kinds of sexual activity which continues without interruption to the end of the reel. Counsel for the appellants, in cases No. 26312, 26313, 26316 and 26326, has stipulated in this court that "the allegations contained in the complaints filed in the Fulton Superior Court concerning the contents of the four films involved in this appeal [are] true and accurate and that substantially everything contained in said four films [is] alleged in the four complaints filed by the appellees in the Fulton Superior Court." With respect to the remaining case, No. 26332, Santay v. Slaton, et al., we need only to say that in the performance of our function as a court of review we have viewed the film there involved. Based on that viewing and upon the allegations contained in the complaints which are stipulated by the appellant to be true, as above quoted, we agree with the conclusion and finding of the trial court as to the nature of the content of the films here involved; that their appeal is solely to prurient interest and that they are wholly without redeeming social value. The finding of the trial court that probable cause exists to conclude that the films entitled, "Innocent Nymph Part II," "Zap," "Can Your Daughter Sit Tonight?," "The Virgin Runaway," and "Take Them

As They Are" are obscene and hard core pornography was amply authorized and the seizure of the same, pending a final determination of that question by a jury, was clearly authorized in each case.

Judgments affirmed with direction. All the Justices concur.

APPENDIX B

RELEVANT SECTIONS OF THE GEORGIA CODE

Georgia Code 72-101. Definition in general.

A nuisance is anything that works hurt, inconvenience, or damage to another; and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance. The inconvenience complained of shall not be fanciful, or such as would affect only one of fastidious taste, but it shall be such as would affect an ordinary reasonable man.

Georgia Code 72-102. Classes; public and private; definitions.

Nuisances are either public or private. A public nuisance is one which damages all persons who come within the sphere of its operation, though it may vary in its effects on individuals. A private nuisance is one limited in its injurious effects to one or a few individuals.

Georgia Code 72-201. Manner of abatement.

Any nuisance which tends to the immediate annoyance of the citizens in general, is manifestly injurious to the public health or safety, or tends greatly to corrupt the manners and morals of the people may be abated and suppressed by the order of any two or more justices of the peace of the county, founded upon the verdict of 12 freeholders of the same county, who shall be summoned, sworn, and impaneled for that purpose; which order shall be directed to and served by the sheriff of the county or his deputy. (Acts 1833, Cobb, 817.)

Georgia Code 72-202. Public nuisance, how restrained.

Private citizens may not generally interfere to have a

public nuisance enjoined, but the petition must proceed for the public on information filed by the solicitor general of the circuit. A public nuisance may be abated on the application of any citizen specially injured. (50 Ga. 451; 76 Ga. 806.)

CHAPTER 72-3. HOUSES OF PROSTITUTION

Georgia Code 72-301. Houses and contents declared a nuisance.

Whosoever shall knowingly erect, establish, continue, maintain, use, own, or lease any building, structure, or place used for the purpose of lewdness, assignation, or prostitution shall be guilty of maintaining a nuisance, and the building, structure, or place, and the ground itself in or upon which such lewdness, assignation, or prostitution shall be conducted, permitted, or carried on, continued, or shall exist, and the furniture, fixtures, musical instruments, and other contents of such building or structure are also declared to be a nuisance, and may be enjoined and abated as hereinafter provided. (Acts 1917 p. 178.)

Georgia Code 72-302. Action to enjoin nuisance, how and by whom brought; temporary injunction.

Whenever a nuisance is kept, maintained, or exists, as defined in the preceding section, the solicitor general or any citizen of the county may maintain an action in the name of the State upon the relation of such solicitor general or citizen to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building upon which such nuisance exists. In such action, the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained

of exists, order a temporary injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, or oral testimony or otherwise, as the complainant may elect, unless the court or judge, by previous order, shall have directed the form and manner in which the evidence shall be presented, that such nuisance does in fact exist. (Acts 1917, p. 178.)

Georgia Code 72-303. Notice of hearing on application.

Three days' notice in writing shall be given the defendant of the hearing of the application and, if then continued at his instance, the temporary injunction as prayed shall be granted as a matter of course. (Acts 1917, p. 179.)

Georgia Code 72-304. Injunction binding throughout judicial district. Contempt.

When an injunction shall have been granted it shall be binding on the defendant throughout the judicial circuit in which it was issued, and any violation of the provisions of the injunction shall be a contempt of court as hereinafter provided. (Acts 1917, p. 178.)

Georgia Code 72-305. Trial; time; evidence of reputation of place.

The action shall be triable as other cases in equity and at the first term of the court. In such action evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of such nuisance. (Acts 1917, p. 179.)

Georgia Code 72-308. Violation of injunction; punishment for contempt; proceedings.

In case of the violation of any injunction granted under the provisions of this Chapter the court, or, in vacation, a judge thereof, may summarily try and punish the offender. The proceeding shall be commenced by filing with the clerk of court an information under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause a warrant to issue, under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. A party found guilty of contempt shall be punished as for contempt in the discretion of the judge. (Acts 1917, p. 179.)

Georgia Code 72-309. Abatement, order of; contempt of court; fees for removing and selling property.

If the existence of the nuisance shall be established in an action as provided in this Chapter, and order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or other movable property used in conducting the nuisance and shall direct the sale thereof in the manner provided for the sale of chattels under execution: Provided, that if it shall appear to the judge that the furniture and chattels are owned by others than the inmates of said house, he may order the effectual closing of the building or place against its use for any purpose, and keeping it closed for a period of one year, unless sooner released. If any person shall break and enter or use a building, structure, or place so directed

to be closed, he shall be punished as for contempt as provided in the preceding section. For removing and selling the movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution, and for closing the premises, and keeping them closed a reasonable sum shall be allowed by the court. (Acts 1917, p. 180).

Georgia Code 72-311. Bond to abate; release of property.

If the owner shall appear and pay all cost of the proceedings, and file a bond with sureties to be approved by the clerk in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept within a period of one year thereafter, the court, or in vacation, the judge, may, if satisfied of his good faith, order the premises, closed under the order of abatement, to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property; and if the proceedings be an action in equity, and said bond be given and cost therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from any judgment lien, penalty or liability to which it may be subject by law. (Acts 1917, p. 180.)

CHAPTER 72-4. NUISANCES IN CITIES

Georgia Code 72-401. Manner of abatement; jurisdiction of police court.

If a nuisance complained of shall exist in a town or city under the government of a mayor, intendant, aldermen, wardens, or a common council or commissioners, such nuisance, by and with the advice of said aldermen, wardens, council, or commissioners, may be abated and removed by order of said mayor, intendant, or commissioners; but if the nuisance complained of shall exist in a city having a population of 20,000 or more, the police court of such city, whether known as mayor's or recorder's court or otherwise designated, shall have jurisdiction to hear and determine the question of the existence of such nuisance, and, if found to exist, to order its abatement, which order shall be directed to and executed by the Sheriff or the marshal of said town or city, or his deputy. (Act 1833, Cobb, 817. Acts 1892, p. 64.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-265

WILLIAM WALTER d/b/a CLASSIC ART THEATRES I AND II AND PATRICIA REILEY WALTER d/b/a ASHLEY ART ADULT THEATRE,
Petitioners,

v.

LEWIS R. SLATON, DISTRICT ATTORNEY, ATLANTA JUDICIAL CIRCUIT; HINSON McAULIFFE, SOLICITOR GENERAL OF THE CRIMINAL COURT OF FULTON COUNTY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

WILLIAM WALTER d/b/a CLASSIC ART THEATRES I AND II AND PATRICIA REILEY WALTER d/b/a ASHLEY ART ADULT THEATRE,
Petitioners,

v.

LEWIS R. SLATON, DISTRICT ATTORNEY, ATLANTA JUDICIAL CIRCUIT; HINSON McAULIFFE, SOLICITOR GENERAL OF THE CRIMINAL COURT OF FULTON COUNTY,
Respondents.

NO. 71-265

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PART ONE

Come now LEWIS R. SLATON, District Attorney, Atlanta Judicial Circuit, and HINSON McAULIFFE, Solicitor General, Criminal Court of Fulton County, Georgia, Respondents named herein, and pray that the Application for Writ of Certiorari to the Supreme Court of Georgia be denied, because the decision of the Court below is not reviewable at the present time, and because said decision involves no substantial federal question.

OPINION BELOW

The decision sought to be reviewed by this Court is reported at 227 Ga. 676 and 182 S.E. 2d 464. It is also set out as "Appendix A" of the Petitioner's Brief.

JURISDICTION

While Petitioners aver that jurisdiction to consider the decision is found in 28 U.S.C. Section 1257(3), Respondents deny that the issue is subject to review by this Court since the decision sought to be reviewed is not yet final, as will be hereinafter shown.

QUESTIONS PRESENTED

I. Is the Georgia Supreme Court's decision "final" within the meaning of 28 U.S.C. Sec. 1257, when said decision relates only to a temporary injunction, and contemplates a jury trial on the merits?

II. May the commercial exhibition of an obscene film be enjoined as a public nuisance?

III. If the commercial exhibition of an obscene movie may be enjoined as a public nuisance, do the Georgia Statutes relating thereto conform to due process when utilized for such purpose?

IV. Are the motion pictures themselves obscene?

STATUTES INVOLVED

Although Petitioners have set out as the Georgia Statutes involved Georgia Code Title 72, Nuisances, additional statutes, state and federal are involved in the consideration of the application. They are as follows:

1) 28 U.S.C. Section 1257(3);
2) Georgia Code Chapter 26-21, as amended by Ga. Laws 1971, p. 344;
3) Georgia Code Section 26-2011, Public indecency;
4) Georgia Appellate Practice Act, Section 1(a) (3), Ga. Laws 1965, p. 18, as amended, particularly by Ga. Laws 1968, p. 1072 at 1073.

STATEMENT OF THE CASE

After certain motion pictures had been advertised in the City of Atlanta and had been viewed by representatives of the State of Georgia, the District Attorney for the Atlanta Judicial Circuit and the Solicitor General of the Criminal Court of Fulton County, Georgia, respondents herein, filed four complaints in the Superior Court of Fulton County, Georgia entitled "Complaint to Declare Motion Picture Obscene and Subject to Seizure." The complaints were filed at different times and concerned four different motion pictures. Three of the complaints named William Walters d/b/a The Classic Art Theatre as party defendant while the fourth named Patricia Reiley Walters d/b/a The Ashley Art Adult Theatre as party defendant. Each of the four complaints set out that the defendants were the owners of the respective theatres; included detailed descriptions of the films; and prayed that the films be declared obscene; that they be seized; and that the defendants be restrained from exhibiting the pictures within the jurisdiction of the court. On October 26, 1971, the trial court ruled on two of the motion pictures, following a reviewing of both by the court. The Superior Court of Fulton County found that "Innocent Nymph Part II" and "Zap" were obscene under the laws of the State of Georgia and ordered one copy of each film be seized and delivered to the Solicitor General of Fulton County, Georgia. The Court further ordered that the defendant be preliminarily enjoined from distributing or displaying the films in question within the Court's jurisdiction.

On the 27th day of October a rule for contempt was filed alleging that the defendant William Walters willfully refused to surrender a copy of "Innocent Nymph

Part II" to the Sheriff while under order to do so. The defendant surrendered the film in question upon pain of contempt after instruction by the Court at the contempt hearing.

On October 30th the Superior Court entered its order on the motion picture "Virgin Runaway" determining it obscene, and giving substantially the same relief as in its order of October 26 set out herein above. Following a viewing of the film, the Court found that "Virgin Runaway" was likewise obscenity and pornography both as a matter of law and as a matter of fact. On November 20, a similar order was entered with regard to the motion picture entitled "Can Your Daughter Sit Tonight."

The three separate orders involving four films and two defendants were consolidated into one case for purposes of appeal to the Supreme Court of Georgia, docket numbers 26312, 26313, 26316, and 26326. (Also consolidated in this appeal were one other order and several other defendants with which we are not here concerned.) In that appeal, Appellants raised the following questions: (1) The legality of the hearings held to determine obscenity; (2) denial of a Motion for Continuance; (3) the issuance of a mandatory injunction; (4) the trial court's denial of Appellant's Motion to Dismiss because the complaint was unverified; (5) the application of the injunctive order to consenting adults; and (6) the trial court's requiring defendants/appellants to produce the films in court.

The opinion of the Georgia Supreme Court reported at 227 Ga. 676, 182, S.E. 2d. 464; rehearing denied 227 Ga. 676 holds that: (1) the hearings afforded were substantially the same as those approved in *Evans Theatre*

Corp. v. Slaton, 227 Ga. 377 (180 S.E. 2d. 712) cert. den. 40 L.W. 3210 (No. 71-89, Nov. 9, 1971) and as such were sufficient adversary hearings; (2) the denial of continuance was discretionary and no abuse was shown; (3) the orders were not mandatory injunctions, i.e. a prior restraint; (4) the question as to verification of the complaint was moot as it related only to the ex parte restraining orders which had been supplanted after the hearings by interlocutory injunctions; and (5) that the trial court's decision was amply supported by the evidence. The Georgia Supreme Court further directed here, as in *Evans Theatre*, that the trial court's order be revised to show its interlocutory nature and that it would only continue in force until a hearing on the merits could be had before a jury. Unlike *Evans Theatre*, no destruction of the films was here ordered; rather they were ordered seized pending final determination by a jury.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT HAS NO JURISDICTION TO REVIEW A DECISION OF THE GEORGIA SUPREME COURT WHICH IS NOT FINAL.

This Court's jurisdiction to review state court decisions by certiorari is set out in 28 U.S.C. Section 1257(3), which section provides that "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) By writ of certiorari . . . where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed

under the Constitution, treaties or statutes of, or commission held or authority exercises under, the United States."

It is apparent from a reading of the Georgia Supreme Court's decision that said decision is not "final," and contemplates that a jury trial is to be had on the material issues involved, including, but not limited to, the issue of the film's alleged obscene nature, whether it constitutes a public nuisance, caused and continued by Petitioners.

A State Court judgment to be within this Court's appellate jurisdiction must be final "in two senses: It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market St. Ry. Co. v. Railroad Commission of the State of California*, 324 U.S. 548, 551, 65 S.Ct. 770, 89 L.Ed. 1171 (1945), rehearing denied 324 U.S. 890, 65 S.Ct. 1020, 89 L.Ed. 1438. That the judgment be final is not merely a technicality, to be easily scorned, but an important factor in the smooth working of our federal system. *Montgomery Bldg. & Const. Trades Council v. Ledbetter Erection Co.*, 334 U.S. 178, 180, 73 S.Ct. 196, 97 L.Ed. 204 (1952) citing *Radio Station WOW v. Johnson*, 326 U.S. 120, 124, a judgment of the highest state court reversing the decree of the trial court in an equity cause, and remanding the cause for further proceedings in harmony with its opinion is not final within the meaning of said statute. *Schlosser v. Hemphill*, 198 U.S. 173 at 175, 25 S.Ct. 654, 49 L.Ed. 1000 (1905). See also *Coe v. Armour Fertilizer Works*, 237 U.S. 413 at 418, 35 S.Ct. 625,

59 L.Ed. 1027 (1915); *Pepper v. Dunlap*, 46 U.S. 51, 5 How. 51, 12 L.Ed. 46 (1847); *Morgan v. Thompson*, 124 F. 203, 59 C.C.A. 672 (Ind. T., 1903). Compare the order in the case *sub judice* with the orders in *Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed. 2d 603 (1968) and *Mills v. State of Alabama*, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed. 2d 484 (1966). See also *Moses v. The Mayor*, 82 U.S. 387, 15 Wall 387, 21 L.Ed. 176 (1873); *Verden v. Coleman*, 59 U.S. 86, 18 How. 86, 15 L.Ed. 272 (1855); *Gibbons v. Ogden*, 19 U.S. 448, 6 Wheat. 448, 5 L.Ed. 302 (1921).

Thus where a trial court issues a temporary injunction, and a Motion to Dissolve the same is denied by said Court, and its decision is affirmed on appeal by the State Supreme Court, the Supreme Court's judgment is not a "final" judgment within the meaning of 28 U.S.C. Section 1257, and therefore is not reviewable by this Court. *Montgomery Building and Construction Trades Council, et al. v. Ledbetter Erection Co., Inc.*, 344 U.S. 178, 73 S.Ct. 196, 97 L.Ed. 204 (1952); *Gibbons v. Ogden*, 6 Wheat. 448, 19 U.S. 448, 5 L.Ed. 302 (1821).

Likewise where the State Supreme Court affirms a lower Court ruling granting a temporary injunction and remands the case back for a jury trial on the merits, its decision on the temporary injunction cannot be considered as a final determination of the issues (assuming the trial court had jurisdiction to grant the temporary injunction).

II. THE COMMERCIAL EXHIBITION OF AN OBSCENE FILM MAY BE ENJOINED AS A PUBLIC NUISANCE, EVEN THOUGH ITS EXHIBITION ALSO CONSTITUTES A CRIME.

In order to properly consider this issue it is necessary to review the legal history culminating with the petition filed by Respondents in the present case.

During the period of time involved there took place in Fulton County, Georgia several police raids, pursuant to search warrants, which resulted in the seizure of allegedly obscene materials. The cases ultimately were decided by three-judge United States District Courts, said decisions were to the effect that this Court in *Marcus v. Search Warrants*, 367 U.S. 717 (1961), and *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964), (see also *Metzger v. Pearcy*, 393 F.2d 202 (7th Cir. (1968)), determined that no seizures of allegedly obscene materials could be had until after an adversary proceeding had determined that the material in question was obscene; and that since no adversary proceedings had been held prior to the seizures in said cases, the seizures were unlawful. See *Central Agency, Inc. v. Brown, et al.*, 308 F.Supp. 502 (N.D. Ga., 1969), *Gable v. Jenkins*, 309 F.Supp. 998 (N.D. Ga., 1969) aff'd. per curiam 90 S.Ct. 1351 (1970), *Sherpix v. McAuliffe*, _____ F.Supp. (unreported) (N.D. Ga., Sept. 2, 1969, C.A. No. 13024), see also *Carter et al. v. Gautier, et al.*, 305 F.Supp. 1098 (M.D. Ga. Sept. 15, 1969).

As a consequence of such decisions Respondents began instituting proceedings identical to the procedure in the case *sub judice*, the effect of which was to afford persons such as Petitioners the "required" adversary proceedings prior to seizure of allegedly obscene ma-

terials. See *Peachtree News Company, Inc., et al. v. Slaton, et al., Buckhead Book Mart, et al. v. Slaton, et al.* (Two Cases), 226 Ga. 471 (1970), *Johnnie Reb's Book and Card Shop v. Slaton,* _____ U.S. _____ (N.D. Ga., March 17, 1970, C.A. No. 13333). Indeed such procedures have inferentially been approved by this Court in its per curiam affirmance of *Gable v. Jenkins, supra,* see fn.3 of argued opinion 309 F. Supp. at 1001. See also *Tyrone, Inc. v. Wilkinson,* 410 F.2d 639, 641 (4th Cir. 1969) cert. den. 396 U.S. 985 (1970).

The precise question of whether or not obscenity can be controlled by injunction is not new to this Court, and has been decided adversely to Petitioner's contentions. In *Kingsley Books, Inc. v. Brown,* 354 U.S. 436 (1956) this Court upheld the constitutionality of a New York statute authorizing the injunction of obscene prints and articles by the Supreme Court of New York, without a jury, upon the complaint of the chief executive or legal officer of any city, town or village. In said decision this Court stated:

> "It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a *qui tam* action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice. See *Tigner v. Texas,* 310 U.S. 141, 148. If New York chooses to subject persons who disseminate obscene "literature" to criminal prosecution and also to deal with such books as deodands of old, or both, with due regard, of course, to appropriate opportunities for the trial of the underlying issue, it is not for us to gainsay its selection of remedies." *Id.* at 441.

Kingsley Books is still good law as shown in *Freedman*

v. Maryland, 380 U.S. 51, 60 (1960), a case strongly relied upon by Petitioners, but easily distinguishable from the case *sub judice*, as is *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 141-142 (1969) also strongly relied upon by Petitioners. However, both of said cases dealt with the prior submission of films to censorship boards, and the evil condemned was not that such a procedure was not unconstitutional, but that in the instant case the statutes involved were unconstitutional because they did not provide for a prompt judicial determination of obscenity—a problem not involved here, since the order appealed was as a result of a judicial determination after the film was exhibited to the public.

Petitioners place their primary reliance on *Grove Press, Inc. v. City of Philadelphia*, 418 F.2d 82 (1962). Their reliance is misplaced. The above case was decided in Grove Press' favor, not because the injunctive procedure is an impermissible method of dealing with obscenity, but because "there is no guarantee a final hearing will be seasonably scheduled after the issuance of a preliminary injunction and that a prompt decision will be forthcoming thereafter." *Id.* at 90. Such deficiencies, however, are not found in the Georgia procedure which is governed by statutory law, as set out as Petitioners' appendix "B," and by the Georgia Civil Practice Act (Ga. Laws 1966, p. 609, as amended, particularly by Ga. Laws 1969, p. 645, and Ga. Laws 1970, p.170). Furthermore, this Court has tacitly approved the procedure utilized here in its affirmance of *Gable v. Jenkins*, *supra*, and the Georgia Supreme Court specifically found that the film was a public nuisance because it was found to be obscene.

A viewing of the films leads us to the conclusion that had the sexual scenes been performed live, they would

have been in clear violation of Georgia Code Section 26-2011 (Ga. Laws 1968, p. 1249, 301). As such they constitute a prohibited lewd performance; and the premises where the performance takes place is a lewd house, and enjoinable as a public nuisance. Can the "heroine" be considered any less a prostitute merely because her services are performed in front of a camera, rather than behind closed doors and she is paid therefor by the movie producer rather than having payment made to her by her clients? We think not!

> "Such acts are prohibited, not because of the injury inflicted on other individuals, as in the case of murder or robbery, but because the acts are offensive to the majority of the people. If any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public." 227 Ga. at 381.

It is because such conduct is offensive to the majority of the general public, that the evil of a lewd house or an obscene movie is amenable to injunction as a public nuisance.

III. THE PROCEDURE USED IN THIS CASE TO ENJOIN THE FILM'S EXHIBITION DOES NOT OFFEND DUE PROCESS.

In the main the issues raised by Petitioners as procedural defects in the Georgia procedure utilized, have been decided adversely to Petitioners in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, which statute allowed injunctions *pendente lite*, and contained no requirement for a jury trial on the issue of obscenity. Additionally,

a distinction should be made between what Petitioners claim might have happened on the face of the statute, and what actually transpired. For, it is not the face of a state statute that governs its constitutionality but how it is construed and applied. *Younger v. Harris, et al.*, 401 U.S. 37, n.4 (1971); *Dombrowski v. Pfister*, 380 U.S. 479, n.7 (1965).

Thus the case involved no ex parte injunction, nor did it involve a delay between filing the complaint, and obtaining a judicial decision. Indeed, the Georgia Supreme Court's interpretation of the decision, which interpretation is binding on the trial court, is more restrictive than the New York statute held constitutional. The Georgia Supreme Court is requiring that the case be remanded for a jury trial in accordance with Georgia Code Section 72-201.

Thus this Court is not concerned with the face of the statutes, if any construction or application thereunder is constitutional; and particularly, what construction and application have actually been utilized. Here no ex parte injunction was issued; the hearing was timely; the court's decision after hearing was timely; the appeal and appellate decision was heard and decided within a reasonably short time; and no doubt a jury trial on the hearing for a permanent injunction will be accomplished within constitutional time limits.

Additionally, the burden of proving the film obscene was carried by Respondents, who will likely do so again in the subsequent jury hearing. (Note: Although Petitioners take the position that due process requires that the State actually prove contemporary community standards, social value, and prurient appeal, Respondents stand on the position that the film speaks for itself, and

that the Court can take notice of its contents when introduced into evidence and determine, as a question of law, its obscenity. We do not intend, thereby, to get trapped into conducting a battle of expert witnesses, when this Court utilizes the same procedure in deciding obscenity. See *Redrup v. New York*, 386 U.S. 767 (1967). Accordingly, except for deviant material, either a Court or a jury is capable of deciding those issues without resorting to a sifting of conflicting testimony by "expert" witnesses and poll takers. Does a judge or juror really have to hear testimony from a third person to know whether or not a particular movie offends the standards of the community in which he lives, is intended to appeal to a prurient interest, or is utterly without social value? These are matters within ordinary common sense and everyday living. Does the fact that an "expert" witness is willing to testify that the national community standards are reflected by the standards of San Francisco, California, which allows waitresses to go both topless and bottomless, and that another "expert" witness testifies to the contrary, alter what the juror knows of his own knowledge? Again we think not! While we concur with the statement in *Freedman v. Maryland*, *Id.* at 58, to the effect that the burden of proving obscenity rests upon those who seek to prohibit it, we believe that the highest and best evidence of such is the material itself.)

IV. NO QUESTION IS FRESENTED AS TO OBSCENITY OF THE FILMS.

In the proceedings before the Georgia Supreme Court, from which this Petition for Certiorari is taken, the Appellants/Petitioners filed with the Court a stipulation to the correctness of the descriptions of the four

films filed with the complaints. As this stipulation amounted to an admission of the obscene and pornographic nature of the films, that question is not presented here.

CONCLUSION

For all the foregoing reasons, Respondent urges this Court to decline to issue the Writ of Certiorari in this case.

Respectfully submitted,

/s/
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/s/
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/s/
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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, and that I have this day deposited in the United States Post Office, Atlanta, Georgia, three copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari with first class postage prepaid addressed to Mr. Glenn Zell, Esquire, Suite 822, 15 Peachtree Street, Atlanta, Georgia, counsel of record for Appellant.

This 24 day of November, 1971.

S/

JOEL M. FELDMAN
Assistant District Attorney
Atlanta Judicial Circuit

APPENDIX A

Georgia Criminal Code Chapter 26-21, Distributing Obscene Materials (Ga. Laws 1968, p. 1249, as amended by Ga. Laws 1970, p. 173 and Ga. Laws 1971, p. 344).

"26-2601. (sic) (i. e. mistake in amended law, should actually be 26-2101) DISTRIBUTING OBSCENE MATERIALS.—(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do. Provided, that the word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material." (1971 amendment).

(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(c) Material, not otherwise obscene, may be deemed

obscene under this section if the distribution thereof, or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(d) A person convicted of distributing obscene material shall for the first offense be punished as for a misdemeanor, and for any subsequent offense shall be punished by imprisonment for not less than one nor more than five years, or by a fine not to exceed $5,000, or both.

26-2102. DISTRIBUTING MATERIAL DEPICTING NUDITY OR SEXUAL CONDUCT.—(a) A person commits the offense of distributing material depicting nudity or sexual conduct when he sends unsolicited through the mail, or otherwise unsolicited causes to be delivered, material depicting nudity or sexual conduct to any person or residence or office unless there is imprinted upon the envelope or container of such material, in not less than eight point boldface type, the following notice:

"Notice—The material contained herein depicts nudity or sexual conduct. If the viewing of such material could be offensive to the addressee, this container should not be opened but returned to the sender."

(b) As used within this section "nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the depiction of covered male genitals in a discernibly turgid state, and "sexual conduct" means acts of masturbation, homosexuality, sodomy, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be female, breast.

(c) A person convicted of distributing material depicting nudity or sexual conduct shall be punished by imprisonment for not less than one nor more than three years, or by a fine not to exceed $10,000, or both. (1970 amendment).

"26-2103. The use of any premises in violation of any of the provisions of this Chapter shall constitute a public nuisance." (1971 amendment, § 26 - 2103 - § 26-2106).

"26-2104. Any materials declared to be obscene by the provisions of this Chapter and advertisements for such materials are hereby declared to be contraband."

"26-2105. (a) Every person who, during the course of a play, night club act, motion picture, television production or other exhibition, or mechanical reproduction of human conduct, engages in conduct which would be public indecency under Code section 26-2011 if performed in a public place, shall be guilty of participation in indecent exposure and upon conviction shall be punished as for a misdemeanor.

(b) Every person who procures, counsels or assists any person to engage in such conduct or who knowingly exhibits or procures, counsels or assists in the exhibition of a motion picture, television production or other mechanical reproduction containing such conduct shall be guilty of a misdemeanor."

"26-2106. If any provision of this Chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are declared to be severable."

APPENDIX B

Georgia Criminal "Code" Section 26-2011, Public Indecency (Ga. Laws 1968, p. 1249).

26-2011. PUBLIC INDECENCY.—A person commits public indecency when he performs any of the following acts in a public place and upon conviction shall be punished as for a misdemeanor:

(a) An act of sexual intercourse;

(b) A lewd exposure of the sexual organs;

(c) A lewd appearance in a state of partial or complete nudity;

(d) A lewd caress or indecent fondling of the body of another person.

APPENDIX C

Ga. Appellate Procedure Act, Section 1(a) (3) (Ga. Laws 1965, p. 18, as amended, particularly by Ga. Laws 1968, p. 1072).

"Section 1. (a) Appeals may be taken to the Supreme Court and Court of Appeals from judgments and rulings of the superior courts, the constitutional city courts, and such other courts or tribunals from which writs of error are authorized by the Constitution and laws, in the following instances:

* * *

(3) From all judgments involving applications for discharge in bail trover and contempt cases; from all judgments or orders directing that an accounting be had; from all judgments or orders granting or refusing application for receivers, or for interlocutory or final injunction; from all judgments or orders rendered after hearing, continuing in effect, modifying, vacating, or refusing to continue, modify or vacate a temporary restraining order; from all judgments or orders granting or refusing applications for attachment against fraudulent debtors; from all judgments or orders granting or refusing to grant applications for alimony, either temporary or permanent, mandamus or other extraordinary remedy; from all judgments or orders refusing applications for dissolution of corporations created by the superior courts; and from all judgments or orders sustaining a motion to dismiss a caveat to the probate of a will.

APPENDIX D

Georgia Civil Practice Act, Section 81A-152(a) (Ga. Laws 1966, p. 609, as amended, particularly by Ga. Laws 1970, p. 170).

"Section 81A-152. (a) Effect. In all actions in Superior Court tried upon the facts without a jury, except actions involving only uncontested divorce, alimony and custody of minors, the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to section 81A-158; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Request for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Section 81A-112 or 81A-156 or any other motion except as provided in Section 81A-141(b). The requirements of this subsection may be waived in writing by the parties. Provided, all verdicts and judgments heretofore rendered in any uncontested divorce, alimony or custody case without findings of fact and conclusions of law are hereby declared to be legal and binding and of the same effect as if such cases had been rendered with findings of fact and conclusions of law."